

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUBEN QUEZADA)	
Claimant)	
)	
VS.)	
)	
BRIDGES, INC.)	
Respondent)	Docket No. 1,036,324
)	
AND)	
)	
BITUMINOUS CASUALTY CORP.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 29, 2008, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. John L. Brennan, of Wichita, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's right shoulder complaints were aggravated by his work duties for respondent and he was, therefore, entitled to medical care for his right shoulder complaints.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 9, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends that claimant has not met his burden of proving that he suffered personal injuries as the result of an accident that arose out of and in the course of his employment.

Claimant asserts that the evidence is uncontradicted that he developed right shoulder problems as a result of his repetitive work activities while employed at respondent and, therefore, the ALJ's preliminary hearing Order should be affirmed.

The issue for the Board's review is: Did claimant suffer personal injuries as the result of an accident that arose out of and in the course of his employment?

FINDINGS OF FACT

Claimant was employed by respondent as an assembler in the building of bridges. He is claiming injuries to his right upper extremity. On August 8, 2006, he injured his right elbow while working. He reported this injury to respondent and has been treated for the injury. Respondent is not contesting a work-related injury to claimant's right elbow.

After the injury to his right elbow, claimant began to notice problems with his right shoulder caused by repetitive hammering. He testified that he spoke with respondent about his right shoulder problems in March or April 2007 and requested medical treatment. The pain in his shoulder continued to worsen. In May 2007, claimant again spoke with a representative of respondent, telling her that he could no longer work on bridges and asking for a lighter job, such as driving a truck. He was told he would be called if respondent could accommodate his request, and he has not received a phone call.

Claimant was treated by Dr. Harry Morris, who diagnosed him with a right rotator cuff tear. Dr. Morris stated that the shoulder condition was related to claimant's work in construction.

Claimant has been examined by Dr. George Fluter at the request of claimant's attorney. Dr. Fluter diagnosed him with internal derangement of the right shoulder and opined that there was a causal or contributory relationship between his current condition and the elbow injury of August 2006.

Claimant was examined by Dr. Mark Melhorn at the request of the ALJ. Dr. Melhorn opined that claimant's work activities may have contributed to his right shoulder condition.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states:

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the

various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.²

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.³

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁵

¹ K.S.A. 2007 Supp. 44-501(a).

² *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

³ *Id.* at 278.

⁴ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁵ K.S.A. 2007 Supp. 44-555c(k).

ANALYSIS

Claimant's Application for Hearing alleges an accident date of "Aug. 2006."⁶ However, claimant testified that he initially injured his right elbow on August 8, 2006, and thereafter developed right shoulder symptoms that continued to worsen through his last day of working for respondent in May 2007. Claimant filed an Amended Application for Hearing on October 9, 2007, which alleges a date of accident of "[o]n or about August, 2006 and each day thereafter."⁷ Nevertheless, for purposes of this appeal from a preliminary hearing order, the issue is not the date of claimant's accident or accidents but whether the shoulder injury is work related. As stated in respondent's Request for Review, "[t]he specific issue upon which review is requested is whether injury arose out of and in the course of employee's employment with respondent."⁸

An MRI performed on April 26, 2007, showed a partial rotator cuff tear. Dr. Morris related claimant's right rotator cuff tear to claimant's work. Dr. Flutter also related claimant's shoulder injury to claimant's work with respondent. Dr. Melhorn opined that claimant's work activities "may" have contributed to claimant's right shoulder condition, but he did not state this causal connection to a reasonable degree of medical probability. Finally, claimant relates his shoulder problem to his repetitive work with respondent, in particular hammering.

CONCLUSION

Based upon the record compiled to date, this Board Member finds that claimant has met his burden of proving his right shoulder injury is causally connected to his work activities with respondent. Claimant suffered personal injury by an accident or accidents that arose out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated January 29, 2008, is affirmed.

IT IS SO ORDERED.

⁶ K-WC E-1, Application for Hearing filed Aug. 30, 2007.

⁷ K-WC E-1, First Amended Application for Hearing filed Oct. 9, 2007.

⁸ Respondent's Request for Review filed Feb. 7, 2008.

Dated this _____ day of April, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: John L. Brennan, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge